



42 other materials generated during the representation? If so, for how long and in what format?  
43 Can a lawyer ever destroy or otherwise purge closed-client files?

44

45 There is no clear rule on when and how a lawyer may purge closed-client files. Similarly, there  
46 is no California statute, rule of professional conduct or case law that specifies an express time  
47 period for file retention in civil matters. In the absence of specific authority on file retention  
48 duties, over the years, local bars have issued advisory opinions in an effort to provide some  
49 practical guidance on file release and retention, with varying recommendations. *See, e.g.*, Los  
50 Angeles County Bar Association Prof. Resp. and Ethics Comm. (LACBA) Opn. 475 (client files in  
51 civil matters should be retained for at least five years but files with intrinsic value to the client  
52 should not be destroyed without the client’s consent); Bar Association of San Francisco Legal  
53 Ethics Comm. (BASF) Opn. 1996-1 (in recommending that a lawyer should retain client papers  
54 necessary to preclude reasonably foreseeable prejudice to the client, stressing that no rule  
55 does or should dictate the number of years a lawyer must retain client papers).

56

57 With respect to closed-client file release and retention duties in criminal matters, advisory  
58 opinions have been more clear and consistent. *See* COPRAC Opn. 2001-157 (client files in  
59 criminal matters should not be destroyed during the client’s lifetime absent client’s  
60 authorization to destroy or otherwise release the files); LACBA Opn. 475 (client files in criminal  
61 matters should be retained for the life of the former client).

62

63 In 2018, the California State Legislature expanded post-conviction file retention duties in  
64 criminal matters involving a conviction for a series or violent felony resulting in a sentence of 15  
65 years or more by amending the Penal Code section 1054.9. Effective January 1, 2019, in all such  
66 matters, “trial counsel” must now retain a copy of the former client’s files for the term of the  
67 client’s imprisonment. As with civil matters, however, no existing rule or statute clearly defines  
68 a lawyer’s file retention duties in other criminal matters that do not fall under Penal Code  
69 section 1054.9.

70

71 This Committee last addressed a lawyer’s ethical obligations relating to the disposition of  
72 former client’s closed files in 2001. Given the subsequent adoption of the new Rules of  
73 Professional Conduct and advances in technology and electronic file storage, the Committee  
74 believes it appropriate to revisit a lawyer’s client file retention and release duties in both civil  
75 and criminal matters. The purpose of this opinion is to provide guidance to lawyers to ensure  
76 the ethical disposition of closed-client files in today’s technological world.

77

78

## DISCUSSION

79

### I. CLOSED CLIENT FILE RETENTION AND RELEASE DUTIES IN CIVIL MATTERS

80

81

82

#### A. Defining client files

83

84

- Rule 1.16(e)(1) provides that a lawyer must promptly release to the client, at the request of the client, “all client materials and property,” which includes

85

86 “correspondence, pleadings, deposition transcripts, experts’ reports and  
87 other writings, exhibits, and physical evidence, whether in tangible,  
88 electronic or other formers, and other items reasonably necessary to the  
89 client’s representation, whether the client has paid for them or not[.]”<sup>1</sup>  
90

91 **B. Duration of file retention duty in closed matters**

- 92
- 93 – If the client requests the files: “[A]ll client materials and property” must be  
94 “promptly” provided to the client. Rule 1.16(e)(1).  
95
  - 96 – If the client does not request the files: There is no California rule or case law  
97 establishing a specific length of time a lawyer must retain client files in a civil  
98 matter after completion of the client matter if the client does not request  
99 their return.  
100
  - 101 – LACBA has advised that, because the client’s right to the file continues after  
102 termination of the attorney-client relationship, absent an agreement, five  
103 years is a reasonable time to retain “potentially significant” materials in the  
104 civil matter. LACBA Opn. 475 (1994).  
105
  - 106 – BASF, on the other hand, declined to recommend a fixed duration for  
107 retention of closed client files in civil matters. BASF Opn. 1996-1. Instead,  
108 BASF approached the issue of file retention in terms of “reasonably  
109 foreseeable prejudice to the client,” and suggested that, as a bailee of the  
110 client’s personal property, a lawyer should retain those client papers  
111 necessary to preclude reasonably foreseeable prejudice to the client.  
112
  - 113 – LACBA’s five-year retention rule is derived from Rule 1.15 (former rule 4-100)  
114 governing a lawyer’s duty to preserve the identity of funds and property of a  
115 client, not rule 1.16 governing a lawyer’s duty to return closed-client files  
116 upon request. As the Committee noted in its opinion 157, however, Rule  
117 1.15 refers not to client file retention but to a lawyer’s duty to retain records  
118 of “funds, securities and other properties of a client or other person coming  
119 into the possession of the lawyer[.]”  
120

---

<sup>1</sup> Whether a lawyer is obligated to release to the client attorney work product not previously communicated to the client is still an open question and is beyond the scope of this opinion. See *Rose v. State Bar*, 49 Cal. 3d 646, 655 (1989) (whether uncommunicated work product must be turned over to the client is an “open question”); COPRAC Opn. 2001-157 (noting “unresolved division in the authorities as to the client’s right to receive uncommunicated work product of the attorney”). The Committee nevertheless recommends that, in determining whether a particular work product should be treated as a client property for the purposes of file retention/disposition, the lawyer consider whether such an item is “reasonably necessary to the client’s representation.” Cal. R. Prof. Cond. 1.16(e)(1).

- 121 – The Committee accordingly declined to adopt the recommendation of LACBA  
122 and instead adopted BASF’s conclusion that there should not be a fixed  
123 duration for the retention of client files in civil matters.  
124
- 125 – The Committee’s reasoning for rejecting a “bright line” rule as to the length  
126 of time a lawyer must retain a closed client file remains sound. The  
127 Committee thus reaffirms its prior conclusion that there is no fixed time  
128 period for which any particular item in a closed-client file must be retained.  
129
- 130 – As the Committee suggested in its 2001 opinion, to ease “the burdens and  
131 expense of preserving former client files,” “[lawyers] handling discrete  
132 matters such as claims or litigation *might* consider including in their fee  
133 agreements a provision the following termination of the representation the  
134 contents of the file may be destroyed without review at the end of a  
135 specified and reasonable period of time, unless the client has requested  
136 delivery of the files to the client.” **[Question: What would be “reasonable  
137 period of time” in this instance? Should the opinion specify? Make a  
138 recommendation?]**  
139

140 **C. Format of client files for retention**  
141

- 142 – **[Question: Should this issue be addressed under its own subheading, or  
143 discussed as a part of the duties with respect to destruction of closed client  
144 files below? The latter may make more sense.]**  
145
- 146 – Lawyers are advised to exercise “good common sense” in determining the  
147 appropriate duration for file retention. COPRAC Opn. 2001-157 (citing ABA  
148 Informal Opn. 1384 (1977)). In exercising “good common sense,” lawyers  
149 should also question whether it is appropriate to maintain files only in  
150 electronic form. It is easier and likely more cost-effective to maintain  
151 electronic files than to preserve hard-copy files, which may require offsite  
152 storage.  
153
- 154 – But absent client consent, certain items should never be destroyed, i.e.,  
155 original papers and materials of “inherent value,” i.e., original stocks, bonds,  
156 wills, deeds, notes, or judgments. LACBA Opn. No. 475.  
157
- 158 – Before going paperless and destroying hard-copies, lawyers should **[must?]**  
159 make reasonable efforts to notify the client and obtain the client’s consent  
160 before destroying any hard copies in the client’s file.  
161  
162  
163

164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207

**D. Duties with respect to destruction of closed client files**

- Absent an agreement on the disposition of client materials after completion of a client matter, a lawyer must make reasonable efforts to obtain the client’s consent before destroying any items in the client’s file. COPRAC Opn. 2001-157.
  
- If the lawyer cannot locate the client or obtain clear instructions from the client, the lawyer may destroy the items unless the lawyer has a reason to believe that a file contains items required by law to be retained or that the client will reasonably need to establish a right or defense to a claim. *Id.* See also ABA Informal Opn. 1384 (1977). This requires an exercise of judgment. COPRAC Opn. 2001-157.
  
- Absent an agreement on the disposition of client materials, if the lawyer is without personal knowledge of the contents of the file, the lawyer is advised to examine the file to determine whether there is reason to believe that the client will foreseeably have need of the contents. **[Question: The Committee previously opined that in such circumstances, “it *may* be necessary to examine the file before concluding whether there is reason to believe that the client will foreseeably have need of the contents.” COPRAC Opn. 2001-157 (emphasis added) But how would a lawyer determine whether the closed file contains any item that the client may need if the lawyer is without personal knowledge of the contents of the file? Should we recommend more strongly that, in that instance, the lawyer *should* examine the file? Or that the lawyer is “advised to” or “strongly advised to” examine the file?]**
  
- Lawyers should follow these rules before going “paperless,” i.e., “scan-and-purge.” No authority specifically addresses whether the firm must notify *current* clients of the existence of a paper file, the right to examine and retrieve the contents, or the lawyers’ or the firm’s plan to scan-and shred. But as such is required as to former clients, it would be prudent to take the same steps as to current client’s papers and property.
  
- **Manner of destruction/Confidentiality:** “The attorney is obliged to use a method of destruction that will ensure no breach of confidentiality.” COPRAC Opn. 2001-157. To ensure confidentiality, a lawyer should use appropriate security, make sure digital backup exists, and before purging any hard copies or other physical materials, make sure they are properly shredded, rendered undecipherable and securely disposed. **[Question: Should this be its own subsection?]**

208 **II. CLOSED CLIENT FILE RETENTION AND RELEASE DUTIES IN CRIMINAL MATTERS**

209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250

**A. Closed Client File Retention Duties for Defense Counsel**

- Existing ethics opinions recommend that client documents related to criminal matters should not be destroyed during the client’s lifetime absent authorization from the client to destroy or release the file. COPRAC Opn. 2001-157; LACBA 475 (citing LACBA Opn. 420).
- In criminal matters involving a conviction for a serious or violent felony that results in a sentence of 15 years or more, trial counsel must retain a copy of the former client's files for the term of the former client's imprisonment. Pen. Code § 1054.9(g). The file may be maintained in electronic form but “only if every item in the file is digitally copied and preserved.” *Id.*
- Notwithstanding defense counsel’s duty to retain client files for the duration of the former client’s imprisonment under the Penal Code section 1054.9, client files in all criminal matters should be retained during the client’s lifetime, absent authorization from the client to destroy or release the file.
- For an lawyer wishing to go paperless, in light of Penal Code § 1054.9(g) (permitting maintenance of client file in electronic format “only if every item in the file is digitally copied and preserved), it would be prudent for the lawyer to have a clear digitalization plan and follow it, for e.g., scanning all incoming documents and returning originals to the client immediately (unless the original is needed for representation).

**B. Closed Client File Retention Duties for Prosecutors**

- There is currently no Rule of Professional Conduct or ethics opinion that directly addresses a prosecutor’s duty to preserve its files or other relevant evidence.
- Penal Code section 1054.9 provide that, upon the criminal defendant’s showing that good faith efforts to obtain “discovery materials” from trial counsel were made but were unsuccessful, the defendant shall be provided reasonable access to “discovery materials,” which is defined as “materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial.” Penal Code § 1054.9(a), (c). But section 1054.9 also expressly notes that the statute “does not require the retention of any discovery materials not otherwise required by law or court order.” *Id.*, subd. (f).

251 – Aside from section 1054.9, there does not appear to be any authority that  
252 imposes any post-conviction discovery obligations. *But see People v. Curl*,  
253 140 Cal. App. 4th 310, 318 (2006) (Even “after a conviction the prosecutor . . .  
254 is bound by the ethics of his office to inform the appropriate authority of . . .  
255 information that casts doubt upon the correctness of the conviction.). This  
256 sentiment expressed in *Curl* is reflected in Rule 3.8(f), which lists certain  
257 ethical duties specifically related to prosecutors, including an affirmative,  
258 ongoing duty to promptly disclose “new, credible and material evidence  
259 creating a reasonable likelihood that a convicted defendant did not commit  
260 an offense of which the defendant was convicted,” when such evidence is  
261 known to the prosecutor. However, Rule 3.8 is silent on obligation to retain  
262 any portions of the prosecutor’s case file.  
263

264 **[Question: Should “Paperless” office be addressed separately under its own subheading and**  
265 **discussed with respect to both civil and criminal matters?]**  
266

267 **III. ANALYSIS OF THE FACTUAL SCENARIOS**

268  
269 [To be added]